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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 AHMED ASHOUR,

4 Plaintiff, New York, N.Y.
5 v. 19 CV 7081 (AT) (OTW)

6 ARIZONA BEVERAGES USA, LLC, et
7 al.,

8 Defendants.

9 -----x Teleconference

10 August 26, 2020
11 11:00 a.m.

12 Before:

13 HON. ONA T. WANG,

14 Magistrate Judge

15 APPEARANCES

16
17 REESE, LLP
18 Attorneys for Plaintiff
19 BY: CARLOS F. RAMIREZ
20 -AND-
21 PEARSON, SIMON & WARSHAW, LLP
22 Attorneys for Plaintiff
23 BY: JOSEPH C. BOURNE

24
25 McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Attorneys for Defendants
BY: ROBERT P. DONOVAN
KATHLEEN N. FENNELLY

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1 THE DEPUTY CLERK: 19 CV 7081, Ashour v. Arizona
2 Beverages, et al. The Honorable Ona T. Wang presiding.

3 Counsel, can you please state your appearances.

4 MR. RAMIREZ: Carlos Ramirez for plaintiff Ahmed
5 Ashour.

6 MR. BOURNE: Joseph Bourne for the plaintiff Ahmed
7 Ashour.

8 MR. DONOVAN: Good morning, your Honor. Robert
9 Donovan on behalf of the defendants.

10 MS. FENNELLY: Good morning. Kathleen Fennelly on
11 behalf of defendants.

12 THE COURT: All right. Good morning, everyone. This
13 is Judge Wang. We are here for a discovery conference, and I
14 just have a few warnings and preparatory remarks.

15 We do have a court reporter on the line, so you should
16 treat this almost as if you are at an audio-only deposition.
17 In other words, say your name before you speak. I think
18 Ms. Fennelly and I may be the only ones who might be able to
19 get away with not having to say our names before we speak.

20 Do your best not to interrupt each other. I assure
21 you, you will all get a chance to be heard. Try to mute your
22 line if you're not speaking. I will do the same when somebody
23 else is speaking. That just cuts down on the external noise
24 and makes it easier for everyone to hear.

25 There may be members of the public and press listening

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1 in on this public line. If members of the press and public are
2 listening, they are to remain on mute. And there is to be no
3 other recording or transmission of this conference.

4 Then lastly, although I never run into a problem with
5 this doing the audio conferences, of course, comport yourselves
6 as you would in my courtroom. The only reason why we are doing
7 this on the phone and not in person is of course because of the
8 pandemic.

9 So, with that started, I'm going to ask defendants to
10 talk to me about their discovery requests and responses
11 shortly, and I'd like to take the requests for production
12 first, then talk about the requests for admissions, and then
13 talk about the interrogatories.

14 But right before I do that, I did want to tell you
15 both, I'm not to rule out of the gate that the requests
16 themselves are objectionable due to their sheer number, but I
17 do have some concerns that for a case involving these facts and
18 these claims that there may have been, in an effort to dot
19 every i and cross every t, there may have been more drafting
20 than was necessary.

21 The other concern I have is whether -- I understand
22 that the parties have gone through the meet and confer process.
23 I'm a little concerned that it might not have been as robust as
24 I would have liked. Because I think there are some of these
25 where the parties could have reached an agreement on what to do

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1 about them before having to have a conference.

2 That said, I'm here. I'm prepared to rule on the
3 record, which is why we have a court reporter here.

4 But I'd like to hear your arguments briefly, and hear
5 your positions. And so first I guess let's hear from defense
6 counsel about requests for production first. And then I'll
7 hear from the plaintiffs on the requests for production, and
8 then we'll take each category of document requests in turn.
9 Now I'm going to put myself on mute. All right. Go ahead.

10 MR. DONOVAN: Thank you, your Honor. This is Robert
11 Donovan. As we set forth in our letters to the Court, this is
12 a complex action. A putative nationwide class certification.
13 And the complaint has multiple complex scientific allegations.
14 And we detailed that in our letter over 130 allegations, five
15 counts, five defendants, naming 16 beverages, 23 photographs,
16 and that the nature of the claims, the complex allegations, the
17 scope of them, impacted the number of requests.

18 Having said that, I understand the Court's view that
19 perhaps some of the requests were duplicative, but as we
20 pointed out, that could also be because of the number of
21 allegations. And a vast number of the requests relate directly
22 to allegations, your Honor. And we detailed them in our letter
23 to the Court on August 21.

24 I don't want to belabor, you know, the point on that
25 score. We've addressed the requests, we've summarized them,

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1 and so, with respect to the document requests, we've set forth
2 why they're relevant, and the reasons for propounding them.

3 We've also agreed to withdraw without prejudice much
4 of the -- well, some of the main focal points of our
5 discussions with opposing counsel, if your Honor recalls, back
6 in June when they wrote their letter, plaintiff took umbrage at
7 making requests about seeking information regarding whether
8 plaintiff's counsel firm filed bankruptcy. We, you know, had
9 withdrawn that request. But by the same token have addressed
10 why those requests or that request could be relevant. And we
11 offered to withdraw it early on. The plaintiff's position as I
12 understood it --

13 THE COURT: Okay. So request number 71 and 80 are
14 withdrawn. I don't need to rule on that then, right?

15 MR. DONOVAN: 71 -- well, not 80, your Honor. 71. In
16 retrospect I guess 80.

17 THE COURT: Talk to me about 80 then.

18 MR. DONOVAN: Okay. So, I think as long as we
19 received the retainer agreement, your Honor, the retainer
20 agreement would bear upon whether and what assets the plaintiff
21 and counsel have with regard to providing or paying for
22 expenses relative to the lawsuit. So if the retainer
23 agreement's provided, I think 80 can be withdrawn.

24 THE COURT: All right.

25 MR. DONOVAN: Without prejudice.

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1 THE COURT: First ruling of the morning. Plaintiffs
2 are directed to provide the retainer agreement to defendants
3 and then request 71 and 80, document requests 71 and 80 are
4 withdrawn. Okay.

5 Next?

6 MR. DONOVAN: And the same is true with regard, and
7 again, your Honor, during the meet and confer, the meet and
8 confer back and June and then the meet and confer after you
9 received the response to discovery. And the other issue that
10 was principally raised by plaintiff dealt or concerned the
11 requests for the passport. And as we've addressed in our
12 letter, your Honor, the issue of the location of the plaintiff
13 is relevant to the claims. The plaintiff has alleged --

14 THE COURT: Let me stop you right there. So,
15 plaintiff's passport will tell you whether he was in California
16 or not?

17 MR. DONOVAN: Your Honor, I'm just explaining why we
18 propounded it. And what we --

19 THE COURT: I don't need to hear why if you are going
20 to withdraw it.

21 MR. DONOVAN: We're agreeing to withdraw it as long as
22 the responses to requests 17, which deal with -- the plaintiff
23 alleged, your Honor, that he resides in Los Angeles,
24 California, through all relevant periods in this case. So --

25 THE COURT: You don't hold copies of a passport

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1 hostage for getting responses to a different request. That
2 request either is relevant and proportional or it's not. It
3 stands on its own, okay. I'm not hearing anything about the
4 passport that would be probative as to whether the plaintiff
5 spent the last seven years in California or how much time he
6 spent in California as opposed to, say, another state. So --

7 MR. DONOVAN: Your Honor, if I may.

8 THE COURT: If you are not going to withdraw it, I am
9 going to strike that one as well.

10 MR. DONOVAN: We'll withdraw it, your Honor. But if I
11 could explain why that request was made.

12 THE COURT: No. It's withdrawn, so you don't need to.

13 What about request number 17?

14 MR. DONOVAN: Your Honor, they've alleged, plaintiff
15 alleged that they reside in Los Angeles County during all
16 periods relevant to their purchases. And we've cited to case
17 law that states that the location of the plaintiff is relevant
18 for purposes of determining standing and for purposes of
19 determining whether a cause of action is cognizable.

20 THE COURT: Why do you need releases? Why do you need
21 releases? Why can't you ask this question in a deposition?

22 MR. DONOVAN: Your Honor, because --

23 THE COURT: Ask for all the last known addresses in
24 the last seven years.

25 MR. DONOVAN: Your Honor, that's true, we can ask at

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1 deposition, but the documents would be confirmatory evidence of
2 that. Asking someone where they lived and then not having
3 documents, if the question is relevant, then documents
4 confirming or evidencing that are likewise relevant.

5 THE COURT: You get the answer under oath in
6 deposition. It will take far less time than we've already
7 spent in this conference to get that information. Or, you can
8 work with plaintiff, plaintiff's counsel, and get a list of the
9 addresses and ask for something, public records or something
10 else.

11 MR. RAMIREZ: We have provided that already. Verified
12 by the plaintiff in our interrogatory under penalty of perjury.

13 THE COURT: Who is speaking now?

14 MR. RAMIREZ: I'm sorry. This is Carlos Ramirez for
15 plaintiff. I just wanted to indicate that we have already
16 provided that information to counsel for the required period,
17 and it has been done by verification of the plaintiff.

18 THE COURT: Okay. Why is that not enough,
19 Mr. Donovan?

20 MR. DONOVAN: Your Honor, again, they've stated where
21 they live, but I'll pull the answer, your Honor. Again, your
22 Honor, there is a portion of the response by the plaintiff
23 which is marked "confidential." Without divulging the
24 confidential nature, which deals with where the plaintiff was
25 originally from and where he graduated high school from, which

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1 is overseas. So, suffice it to say, Judge, I'm back to the --
2 if the plaintiff alleges that he resides in California through
3 the scope of relevant purchases, his location -- for want of a
4 better term, you know, we're entitled to look at documents that
5 would corroborate or confirm that statement.

6 Just because the plaintiff testifies to it, doesn't
7 make it so. So, documents that would prove, whether it be a
8 driver's license, whether it be a lease that shows that he was
9 living somewhere. It could be redacted. We have a protective
10 order. Some confirmatory document that proves that he was in
11 California during the period that -- the four-year period that
12 he says he purchased product. He says he purchased product
13 from 2014 to 2018.

14 He's originally from overseas, and, frankly, I know
15 we've withdrawn the request, but I'll put on the record why the
16 passport may be relevant, because he may go back overseas
17 during that 2014-2018 period, which would be probative of
18 whether his interrogatories that he bought a product two or
19 three times a week for four years at a particular store.

20 A party is not obliged to just accept someone's
21 statement, whether it's under oath or not. We are entitled to
22 see if there is documents that are probative or prove that or
23 don't prove that.

24 MR. RAMIREZ: Your Honor, this is Carlos Ramirez. I
25 feel that defendants are injecting a standard here that is not

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1 recognized under the law. The fact is that it would appear to
2 me that defendants would expect for the plaintiff to never,
3 ever leave the state of California for four years, and if he
4 does, he no longer has standing.

5 I believe that deposition testimony under oath, the
6 verification he already provided to counsel with his addresses
7 is enough under the law. And just because he's not a U.S.
8 citizen doesn't mean we somehow apply a different and
9 heightened standard. That simply is not required, and,
10 frankly, sounds discriminatory.

11 MR. DONOVAN: Judge, I object to that. This is Robert
12 Donovan. It's not discriminatory. They allege --

13 THE COURT: I am concerned that you are suggesting
14 that a response in an interrogatory is not sufficient at this
15 point in time. Mr. Ashour hasn't even been deposed yet. I am
16 not going to require that he -- I find this is also not
17 proportional to get him to get his residential leases over the
18 past seven years.

19 All right. So, that's my ruling on request for
20 production number 17 as well. It's been satisfied by the
21 interrogatory responses.

22 What about plaintiff's communications with FBC
23 Industries? How is that relevant and probative to this case
24 and the claim that Mr. Ashour would have to prove?

25 MR. DONOVAN: That's an allegation in the complaint,

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1 your Honor. They allege that -- not that they had
2 communications, but they allege a statement from FBC Industries
3 in the complaint. So, I'd like to know whether he had any
4 communications with FBC Industries.

5 THE COURT: Mr. Ramirez or Mr. Bourne, can you address
6 this one?

7 MR. RAMIREZ: Absolutely, your Honor. Again, these
8 are not proportional. They are irrelevant. The simple --

9 THE COURT: No. I just want to understand, tell me
10 about the statement made by FBC in the complaint or the
11 allegation that FBC made a statement. Is that a public
12 statement that you can point defendants to? Tell me how it
13 might or might not relate to the elements of the claims that
14 Mr. Ashour needs to prove.

15 MR. RAMIREZ: Your Honor, because I don't have that
16 specific paragraph in front of me, I do have the complaint, if
17 counsel for the defendants can please point me to the paragraph
18 so I can look at that.

19 MR. DONOVAN: It's paragraph 28, your Honor. And if I
20 may, your Honor, while opposing counsel looks at that, it
21 talks, it refers to in a footnote, I guess it's quoting FBC
22 Industries' website. And it quotes: Citric acid is the most
23 commonly used acidulant in the industry. It states that as a
24 food-grade product, citric acid is used as a flavoring and
25 preservative. If the --

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1 MR. RAMIREZ: Can I answer the question?

2 MR. DONOVAN: Your Honor, if I may. If the
3 communication with regard to FBC Industries, if there was
4 communications between the plaintiff and FBC Industries
5 regarding that, that's relevant. Because --

6 THE COURT: Wait. Wait. Mr. Donovan, you just said
7 yourself that it appears to be a statement on FBC's website.
8 So why on earth would you be looking for any communications
9 between plaintiff and FBC?

10 MR. DONOVAN: Because if there were communications
11 between -- if FBC is taking the position that it's a
12 preservative and advised the plaintiff of that, the issue of
13 when and how and why they found that out would be relevant.
14 What if they found out about it before they purchased the
15 product? What if they found out about it after they purchased
16 the product?

17 THE COURT: Why don't you ask Mr. Ashour about that in
18 a deposition. This is a request for documents.

19 MR. DONOVAN: I understand, your Honor. But if,
20 again, we're back to if the request -- this is an allegation
21 made in the complaint. And the documents that I'm seeking
22 would be relevant and important, rather, to the deposition.
23 Because if there were communications, I could ask them about
24 them. If there weren't, there aren't.

25 MR. RAMIREZ: Your Honor, if I may.

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1 THE COURT: Mr. Ramirez, you're winning this argument
2 without even having --

3 MR. RAMIREZ: I apologize. I know. Don't strike oil
4 when you're getting gold, or whatever it is. I hear you.

5 THE COURT: Anyway, I mean, this seems to be an
6 assertion that is an issue of fact, whether citric acid is a
7 preservative for the purposes of this case, that if it is not
8 something that a Court could take judicial notice of, it is
9 something that would be argued by the expert. So I'm not sure
10 how whether plaintiff has had any communications with FBC
11 potentially relates or is proportional to the needs of this
12 case.

13 You can ask that question in the deposition. If
14 something pops out that is unexpected, you're talking about a
15 footnote in the complaint that talks about the nature of citric
16 acid. You can ask your own experts, you can defend this case
17 by asserting that citric acid is or is not a preservative. But
18 I still am not sure how whether plaintiff has had any
19 communications with FBC is --

20 MR. DONOVAN: Your Honor, I understand.

21 THE COURT: -- proportional.

22 MR. DONOVAN: I understand your Honor's rule. And we
23 can obviously move on. But again, if there were
24 communications, this is -- there is a quote of the website on
25 paragraph 28 alleging that citric acid is a preservative

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1 commonly used. If plaintiff had communications or became aware
2 of that website or had communications with FBC about that
3 statement, e-mail or otherwise, prior to making any of his
4 purchases, that goes to the issue claimed that he was deceived,
5 because he would have allegedly known of this website.

6 THE COURT: But you can ask the broader issue, as you
7 just put it, Mr. Donovan, is, was there any point in time
8 before Mr. Ashour brought this lawsuit that he came to
9 understand that citric acid was used as a preservative or where
10 he did any research on what citric acid is or whether he asked
11 anybody or he came into this knowledge.

12 The fact that you are trying to develop in defending
13 your case is at what point in time did Mr. Ashour come to know
14 that citric acid was used as a preservative or was commonly
15 used as a preservative, because it's getting to whether
16 labeling on the Arizona iced tea was fraudulent as to him.

17 Asking for communications with one entity that may
18 have made this statement on their website is not proportional.
19 It is not going to get you that ultimate fact, one way or the
20 other. Okay. And that's why I said you ask that question at
21 deposition.

22 MR. DONOVAN: Understood, your Honor.

23 THE COURT: What about 68, 69 and 79, which my law
24 clerk tells me are agreements concerning this action and
25 others. Are those still active?

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1 MR. DONOVAN: 68, your Honor, I thought your Honor
2 ruled on the retainer.

3 THE COURT: Right. But you said you only were
4 withdrawing 71 and 80. Do you agree to withdraw those as well?

5 MR. DONOVAN: I thought you mentioned 68. 68 was the
6 retainer agreement. I thought your Honor said that was
7 discoverable.

8 THE COURT: What about 69 and 79?

9 MR. DONOVAN: If there are agreements to share fee
10 with others and contracts with others to prosecute the lawsuit,
11 that's relevant to adequacy of representation. If there are
12 others that are sharing in the fees. I can agree to withdraw
13 it for now without prejudice, your Honor, because it deals with
14 class issues. If your Honor so inclined.

15 THE COURT: Why don't we do that. Is that the same as
16 for 79?

17 MR. DONOVAN: I think 69 and 79 are what -- I
18 apologize, your Honor. I didn't hear you. You said 68's been
19 ruled upon in defendants' favor, but 69 is withdrawn without
20 prejudice, and 79 is withdrawn without prejudice. There is
21 another one your Honor mentioned? I'm sorry.

22 THE COURT: Sorry. 69 and 79 are withdrawn without
23 prejudice. 68, which pertained to the retainer agreement,
24 plaintiff will produce the retainer agreement.

25 What about number 70? Is that also still at issue?

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1 MR. DONOVAN: Your Honor, it is a relevant request if
2 the plaintiff, if plaintiff's -- again, we'll withdraw it based
3 on the production of 68 without prejudice, Judge.

4 THE COURT: Thank you. We dealt with 76. There is a
5 whole group of requests where the requests are for information
6 concerning the defendants, and Mr. Ramirez's argument is that
7 the defendants are better able to get that information and they
8 have it all.

9 MR. DONOVAN: Judge, I don't know what requests those
10 are referring to. I apologize. I don't.

11 THE COURT: Let me see. Mr. Ramirez, can you help me
12 out here?

13 MR. RAMIREZ: 88 are requests for production of
14 documents that systematically track allegations that putting
15 aside the fact that has been ruled in the past by other courts
16 as unduly burdensome, they are within defendants' exclusive
17 knowledge. For example, request for production number 10, that
18 defendants manufacture, market, label and distribute beverage
19 products. Requests for production of documents 21 and 22 and
20 60, how citric acid is manufactured.

21 Page two of plaintiff's June 17, 2020, submission, and
22 it is the fourth paragraph on page two.

23 THE COURT: I said I'm not going to rule based on
24 number. But this grouping was another grouping that was a
25 little bit concerning to me.

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1 MR. DONOVAN: Judge, we're dealing with, so I know,
2 10, 21 and 60?

3 MR. RAMIREZ: 21, 22, 60, 35 --

4 MR. DONOVAN: Hold on. Please do that again.

5 MR. RAMIREZ: Sure. I will. 21, 22, 60, 35, 57, and
6 120.

7 MR. DONOVAN: Your Honor, whether or not these
8 documents are -- some of the documents or none of the documents
9 relating to the allegations are in defendants' possession,
10 that's not a valid basis to not respond. Defendants are making
11 allegations about how our products are manufactured, marketed
12 and sold. If they have documents that are responsive to that,
13 that's a valid request and they're obliged to produce them. I
14 don't know what document they are relying on, your Honor.
15 Defendants don't know. It is up to the plaintiffs to say these
16 are the documents that we have that relate to those
17 allegations. These requests are not made out of whole cloth.
18 They relate to allegations in the complaint. If they have
19 documents germane to that allegation, that's why the requests
20 are being made. They are not made to harass, your Honor.

21 It is just a 130 class allegation complaint, and we're
22 entitled to ask for documents relating to those allegations.
23 So, it's not any different, it's not any different. If the
24 plaintiff asked the defendants for a document, and our response
25 would be you have the document, that's not a valid objection.

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1 MR. RAMIREZ: May I, your Honor? This is Carlos
2 Ramirez.

3 THE COURT: Go ahead.

4 MR. RAMIREZ: Thank you, your Honor. Your Honor, Rule
5 26(b)(1)'s proportionality requirements state that to the
6 extent that a party's relevant information is different for one
7 side versus the other, that is something the Court can
8 consider. Here, the access to this relevant information is
9 exclusively in the defendants' possession. So under Rule
10 26(b)(1), the defendants' request is improper.

11 And I just want to highlight something very quickly
12 here. You know, instead of focusing on individual issues, I
13 would love for the Court to look at the theme here. These
14 defendants are asking my clients for credit card statements,
15 bank statements, canceled checks. When has the purchase of a
16 beverage of 99 cents ever come up on any of these documents?
17 These are private, personal financial documents. Everyone,
18 including my 10 year old, knows that a beverage purchase would
19 not appear on a canceled check, yet defendants have propounded
20 these absolutely ludicrous documents.

21 In the decades and decades of combined class action
22 experience with the attorneys at my firm and co-counsel, we
23 have never seen anything like this. These 136 requests, the
24 140 requests for admissions, are clearly intended to do one
25 thing: That is to intimidate and to harass our client, your

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1 Honor. And please, we ask that the Court keep that in mind as
2 we go through these document requests. The manufacturing of
3 the production of citric acid, how is that relevant to
4 anybody's claim?

5 This is a very simple straightforward false labeling
6 case. Defendants mislabeled their products. Full stop.

7 MR. DONOVAN: Judge, this is Robert Donovan. We take
8 issue and object to that characterization. We're on request
9 10, 21, 22, 60, 35, 57 and 120, and we stated our position as
10 to why these requests were being made. They are in response to
11 allegations made in the complaint. If the plaintiff doesn't
12 have documents relating to that allegation, they can say that.

13 THE COURT: Those facts actually could be admitted. I
14 mean, defendants are the ones who have the documents that
15 relate to, for example, which markings on which labels were in
16 fact used in California, for example. Okay. And I expressed
17 my concern at the beginning of this conference that there were
18 a number of these requests that attorneys meeting and
19 conferring in good faith would have resolved on their own, and
20 I'm really having a hard time here. I'd like to rule on these
21 on the record and if -- do not interrupt me again, please.

22 MR. DONOVAN: Sorry, your Honor.

23 THE COURT: And I am still not hearing how these
24 requests are proportional, or how this is information that
25 defendants do not have better access to, and how this

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1 information is relevant to plaintiff's claims.

2 Go ahead, Mr. Donovan.

3 MR. DONOVAN: Your Honor, I apologize for
4 interrupting. One of the realities of what happened here,
5 Judge, is that during the -- I think your Honor was accurate in
6 stating what occurred. During our meet and confer, we did not
7 go item by item through these requests in large part because
8 we're up against the -- we didn't because the plaintiff's
9 position has been that all the requests, the sheer volume is
10 too much, withdraw your request, re-propound them, and then
11 we'll see which ones we're going to respond to and reserve all
12 our rights to object.

13 So we've never gone through -- your Honor, we've never
14 gone through the process of why item 10 is not discoverable,
15 why item 21 if it could be changed. We haven't gone through
16 that process.

17 So, your Honor, I understand what you're observing.
18 I'm willing to meet and confer about those requests. So,
19 suffice it to say that based upon what I'm understanding your
20 Honor's inclination is, that 10, 21, 22, 35, 67 and 120, you
21 know, we would like to meet and confer again with the
22 plaintiff, which I think they've offered to do in their most
23 recent letter, and see if we get a resolution to those. And if
24 not, then we don't and then defendants will have to make a
25 decision there.

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1 MR. RAMIREZ: Your Honor, if I may.

2 THE COURT: No. At the outset of this conference, I
3 had told you both that I was a little bit concerned that the
4 meet and confer process was not that robust, because counsel
5 working in good faith should have been able to resolve all of
6 these.

7 We are past the point of making you go back and have a
8 more robust meet and confer on 10, 21, 22, 60, 35, 57 and 120.
9 I'm granting a protective order that plaintiffs do not need to
10 further respond to those requests.

11 What I'm going to do now, as far as the requests for
12 production, however, is I am going to direct you to go back and
13 have a meet and confer that addresses any of the remaining
14 requests for production that are still at issue. Any ones that
15 have not been ruled on today that either the defendants think
16 that the plaintiff's responses and objections are not valid or
17 insufficient, as well as any requests that plaintiffs believe
18 are either overbroad or not proportional or seek irrelevant
19 information or not reasonably calculated, etc., etc., etc., you
20 are going to have a robust meet and confer on anything
21 remaining on which you have a dispute. Because what I'm
22 hearing from Mr. Ramirez is that there are others that were not
23 specifically identified in the letters, and I'm not going to go
24 through them now. Okay. But I will rule on what I can rule
25 on, because we've been here on the phone or I've been here on

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1 the phone for about 45 minutes now, and we are not going to
2 make this time go to waste and have you go back and meet and
3 confer on things I can rule on.

4 So now let's go to the request for admissions.

5 MR. DONOVAN: Your Honor, this is Robert Donovan.

6 There are 16 beverages identified in the complaint. A large
7 number of the requests seek information about those beverages
8 identified in the complaint whether plaintiff ever purchased
9 the products. And if not, and because the plaintiff, because
10 the party is not bound by denial, it is only bound by
11 admission, the requests would then ask whether the plaintiff
12 did not purchase. And again, your Honor, we're back to the
13 scope of these claims, nationwide, 16 beverages, over a
14 six-year period. And that is the issue with respect to the
15 quantum of them.

16 These requests seek facts uniquely within the
17 plaintiff's knowledge. The plaintiff has alleged that, for
18 instance, that the labeling of no preservatives was material to
19 his purchase and he relied on it. Has he purchased other
20 products like that? That would be probative of his claim of
21 materiality in this case. If he's never purchased any other
22 product that was labeled no preservative or had citric acid,
23 that's an important fact to know. Because if he's making a
24 claim individually, your Honor, this is, you know, we are
25 dealing about the individual that this was important to him.

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1 We would like to know his purchasing history about similar
2 products. That's another portion of these requests.

3 And during our meet and confer, I know your Honor
4 wanted us to address that. We were, again, didn't go at
5 seriatim through each request. The requests were deemed not --
6 they were objected to on sheer volume and because of the
7 improper form. But none of the requests were responded to.
8 Just like none of the documents were responded to, your Honor.
9 So, the defendants were left in a position to have to file this
10 letter request, because we didn't receive any discovery and
11 haven't on document requests for admissions.

12 So but with respect to the requests for admissions,
13 we've addressed why they're relevant, why they're proportional
14 in our letter at page three, your Honor.

15 THE COURT: All right. I want to try to make --

16 MR. RAMIREZ: May I, your Honor?

17 THE COURT: No, you may not.

18 MR. RAMIREZ: Okay.

19 THE COURT: I'm trying to make this a little faster.

20 MR. RAMIREZ: Just trying to correct the record, your
21 Honor. That's it, I apologize.

22 THE COURT: I'm not the judge who is going to be
23 trying this case. So it's all right. The record is what it
24 is. I understand your views on both the interpretation of the
25 federal rules of civil procedure, the aims of discovery, and

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1 your views on whether these are appropriate or not.

2 MR. RAMIREZ: Okay.

3 THE COURT: Generally, back when I was in practice,
4 the effect of using requests for admission was to authenticate
5 documents, not to get admissions for denial of the ultimate
6 allegations in the complaint. It just does not seem like a
7 good use of anybody's time or effort to be doing that. And
8 again, I go back to my initial concern that I expressed at the
9 beginning of this conference, which is a more robust meet and
10 confer process, where the counsel are speaking in good faith
11 about what the actual information is, what the actual facts and
12 information are that are sought to be elicited.

13 So, I'll give you a choice. Because Mr. Donovan,
14 plaintiff's counsel have an obligation under Rule 11 when
15 drafting and filing of the complaint. These almost seem to be
16 trying to do discovery on plaintiff's Rule 11 obligations,
17 which I'm not sure is a good use of your time or resources.
18 Again, some of this I think is better addressed in a
19 deposition.

20 But, I'll give you two options, and you can decide
21 among yourselves how you want to do this, okay.

22 Option one is that the defendants can withdraw them
23 now and really work in good faith to reduce the number and
24 think about what you're trying to do with requests for
25 admissions and then have your meet and confer. So, in other

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1 words, defendants, you can withdraw them now, and then go
2 through them, have a meet and confer about what plaintiffs
3 thought were problematic in this round, and then you can
4 propound new ones. Or, because it's not really a heavy lift to
5 cut and paste or object, that plaintiff can just respond to
6 them, click with the mouse once you get your objections and
7 your responses in, and provide your response.

8 I don't think either option is going to really advance
9 the case either way. It's not really going to help the
10 defenses, it's not going to really help plaintiff's claims
11 either. So, it is really up to you.

12 MR. DONOVAN: This is Robert Donovan, your Honor.
13 With regard to option one, I guess that would be most efficient
14 except may I ask your Honor if we can tweak option one?
15 Instead of withdrawing, surely there is going to be some of the
16 requests that are proper. It was across the board none of them
17 were answered mainly, you know, because of sheer number and --

18 MR. RAMIREZ: Not true. Not true.

19 MR. DONOVAN: Your Honor, based on that, based upon
20 what your Honor said, I'll withdraw the -- I choose option one
21 I guess in the interests of moving matters along. I don't want
22 to belabor the point.

23 But your Honor, the other reason why these requests
24 are being made is to make the deposition move smoother. To
25 have to go into deposition without knowing that certain

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1 beverages are off, they were never purchased at all, they are
2 not part of the claim, and with a binding admission, you go
3 into a deposition. So much could change in their answer to
4 interrogatories, and I made a mistake. That's the reason why.
5 Because we get a seven-hour limit. If these requests, that's
6 one of the main purposes of them, is to focus on the particular
7 products at issue in the case, a large part of them.

8 I understand your Honor's rule. Defendants are
9 inclined to do option one.

10 THE COURT: Why don't you do that. And before you do,
11 or before we move on to the interrogatories, I'm going to
12 caution Mr. Ramirez.

13 Mr. Ramirez, Mr. Donovan has taken most of the heat in
14 this conference because these were their requests, and I put it
15 upon them to defend them. However, that also doesn't mean, you
16 know, a robust meet and confer means that you are also speaking
17 with Mr. Donovan more clearly about what the ultimate facts and
18 the elements of claims are intended to be and why you think the
19 requests are objectionable. Okay? In your future meet and
20 confer process.

21 I hear your frustration. You don't even need to be in
22 front of me in the courtroom for me to hear and understand your
23 frustration. However, often times responding with frustration
24 doesn't help narrow things down. I think chipping away at
25 particular requests might be more productive here. But, let's

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1 see what Mr. Donovan comes back with in terms of requests for
2 admission.

3 I mean, I do want you to take back, Mr. Donovan, that
4 if have two requests for admission for every factual allegation
5 in the complaint, I'm not sure what your ultimate aim is
6 because it is essentially suggesting that plaintiff and counsel
7 didn't follow and abide by their Rule 11 obligations when they
8 filed the complaint, which you didn't serve a Rule 11 notice
9 when the complaint was initially filed.

10 So maybe it's time to move on from that and look at
11 the elements and the facts that you want to elicit that would
12 help you in your defense.

13 MR. DONOVAN: I understand, your Honor. This is
14 Robert Donovan. And the purpose of the requests are nothing to
15 do with Rule 11. Again, we've explained why we wanted. 16
16 beverages, Judge, and our approach was to get a binding
17 admission whether or not this defendant purchased a product.
18 And if the defendant were to deny a request, that's not a
19 binding admission. So, that was the approach.

20 I understand your Honor's ruled or rather we're now
21 going to withdraw them and see if we can narrow them down and
22 we will do so, your Honor.

23 THE COURT: When do you think you can propound your
24 revised requests for admission?

25 MR. DONOVAN: Two weeks, your Honor.

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1 THE COURT: So that puts us at the Wednesday after
2 Labor Day. Would you like the 11th or the 18th?

3 MR. DONOVAN: I'll take more time. The 18th is fine,
4 your Honor.

5 THE COURT: So new request for admission by
6 September 18.

7 MR. RAMIREZ: If I can just make a request of the
8 Court that I think might help with the meet and confer process.

9 THE COURT: Hmm-hmm.

10 MR. RAMIREZ: This is Carlos Ramirez. Your Honor, I
11 think the frustration that I think the Court may have
12 experienced today is Mr. Donovan, who we have tried to meet and
13 confer with, we didn't just say sheer volume we are not talking
14 to you. We did try and meet and confer with him. He never
15 understood our position. The thing where he wouldn't give in
16 to anything with the Court, that was the same tone he took with
17 us, including when he was trying to defend the passport.

18 I have traveled all over the world. Some countries
19 stamp them, some countries don't. Some countries don't even
20 require them.

21 I would ask the Court to please instruct both of us
22 that we do need to give in a little bit. Not everyone is right
23 all the time. And I think with that instruction, I think we
24 might be able to have a more fruitful meet and confer.

25 THE COURT: Thank you, Mr. Ramirez.

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1 MR. RAMIREZ: Thank you, Judge.

2 THE COURT: I won't do that because I think that's
3 explicit and implicit in my individual practices. I'm a little
4 disappointed that it seems like the letter of the rule and
5 practices might have been observed, but the spirit might not
6 have been.

7 So, I am going to give you a little bit of light
8 homework in the spirit of theoretical back-to-school time.
9 Why don't you each take a look at Rule 1 of the Federal Rules
10 of Civil Procedure and potentially some of the case law that
11 interprets it. And really try to internalize that and use that
12 in your meet and confer processes in the future.

13 Let's move on to interrogatories. Let's see. I have
14 notes here. My concern is that some of these are better
15 answered or addressed through expert discovery. There is also
16 an obligation to supplement discovery as you come to learn
17 things.

18 I guess now that you have heard where I am going or
19 where I was going with the requests for production and the
20 requests for admission, I was wondering if you might want to
21 try to have a more robust meet and confer on those, or whether
22 you want to try to narrow them or maybe just withdraw them
23 without prejudice and wait until expert discovery or other
24 discovery is done.

25 One of the things that caught my eye was

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1 interrogatories 9 and 10, which certainly seem to be not
2 proportional and aren't going to get you the admissible
3 evidence or the facts and underlying information you are trying
4 to get where you ask for an identification of all products
5 consumed in the last seven years containing citric acid. Or
6 identification of all products purchased in the past seven
7 years that had a no preservatives label.

8 I can't remember what I bought at the grocery store a
9 week or two ago. I can't remember, other than in general
10 terms, what I ate a week or two ago, unless it was
11 spectacularly memorable, and most of my cooking is not.

12 I guess I'm trying to understand, part of this problem
13 is that, at least with those interrogatories, is that you're
14 asking for perfect recall of something that no reasonable human
15 being would have either perfect recall or records of. And so I
16 guess I'd like to hear your reaction or your thoughts,
17 Mr. Donovan, on that.

18 MR. DONOVAN: Your Honor, based upon the tenor or the
19 approach, we can withdraw those. But I'm willing to address
20 why it's relevant whether the plaintiff can recall or can't
21 recall a response to a question. I understand the reality of
22 past purchases. But, the plaintiff's claim in this case is
23 that this label and the contents -- certainly the label -- were
24 material to his -- the no preservatives was material to his
25 purchase. If the plaintiff never purchased any prior product

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1 that had that label, or if they did, that would bear upon the
2 allegations of materiality.

3 They also claim, your Honor, that there was a premium
4 paid for the product. Well, if same product, similar product
5 with the same ingredients, with the same label, was purchased
6 by him, we'd like to know what the price was. That could bear
7 upon the issue of any alleged premium.

8 The plaintiff has stated in their opposition that
9 reliance is not an element of their claims. It is an element
10 of the plaintiff's individual claim. So if he never relied
11 upon the label ever before, and only did it with respect to
12 this product, or perhaps relied on the label after he purchased
13 this product with respect to other products, that's why these
14 requests were propounded.

15 The amount of time, your Honor, the six years, it's
16 May 13 or May 14, 2013, that's a function of the statute of
17 limitations. They've sued nationwide class for unjust
18 enrichment which in certain states is six years.

19 The defendants are not looking to harass. They are
20 making a request germane.

21 Having said all that, your Honor, and based upon what
22 we've discussed about having a meet and confer, we can withdraw
23 those without prejudice, your Honor, and we'll leave that to a
24 deposition or perhaps we can reach -- we can amend those two
25 interrogatory questions.

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1 THE COURT: All right. Thank you, Mr. Donovan. I
2 will consider that the interrogatories as a whole have been
3 withdrawn. Those two, again, when I was in private practice,
4 and I was prepping witnesses for deposition, particularly
5 people who had really not encountered litigation before, one of
6 the things I always told them was this is not a memory test.
7 You just answer to the best of your ability. And the problem
8 with interrogatories is that they ask for very specific
9 identification, which is a little bit concerning. So that's
10 for interrogatories 9 and 10.

11 For the others that relate to, say, you know, the
12 unjust enrichment, that there was a premium paid or you're
13 getting to whether -- I mean, some of this does start to sound
14 more like expert discovery. And that's really probably going
15 to be up to the plaintiff. Do defendants have their own
16 documents that relate to market research on how much, how we
17 should price different products in different areas.

18 I'm not suggesting, by the way, Mr. Ramirez, that you
19 propound these discovery requests. But some of this
20 information is only going to be obtainable by having experts
21 reviewing other data that is not in plaintiff's possession,
22 custody, or control or certainly not now. Okay?

23 MR. DONOVAN: Judge, this is Robert Donovan, if I may.
24 It's eight and nine that's being withdrawn. Not all the
25 interrogatories, your Honor, right?

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1 THE COURT: Nine and 10.

2 MR. DONOVAN: Nine and 10, excuse me. Nine and 10 are
3 being withdrawn.

4 THE COURT: Well, number two, number two relates to
5 the damages computation.

6 MR. DONOVAN: Can I address that, your Honor?

7 THE COURT: No. Because I'm going to give you the
8 same option I gave you with the request for admission. You can
9 withdraw those and then work in good faith, to meet and confer
10 on the other ones, if there is any dispute about any of the
11 other ones. Or I'll rule on these, and then I'll ask
12 plaintiff, I mean, I guess here's the thing.

13 Two, 9 and 10 ought to be withdrawn. If you decide
14 that you're not going to withdraw them, I will rule on them and
15 say that these are premature and that plaintiff need not
16 respond to them. However, I think that still leaves about 18
17 interrogatories that may or may not be problematic. I can't
18 tell because Mr. Ramirez didn't also address each one
19 specifically. So then I would then require you to meet and
20 confer and see if there's still an outstanding issue after your
21 meet and confer.

22 MR. DONOVAN: Your Honor, this is Robert Donovan.
23 Based on that, we'll withdraw interrogatory number two. Those
24 were the only ones that were raised in dispute, your Honor.

25 THE COURT: Okay. What's your discovery end date

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1 right now?

2 MR. DONOVAN: March 1, 2021, your Honor.

3 THE COURT: I don't need to extend that. So
4 Mr. Donovan, you're providing revised requests for admission
5 September 18. Parties are to meet and confer on any
6 outstanding requests for production that were not ruled on
7 today and on which there may still be a dispute. So then, and
8 same goes for any interrogatories that were not ruled on today.
9 And then I am going to put you on for a joint status letter to
10 be filed on October 16.

11 MR. DONOVAN: October 15, your Honor?

12 THE COURT: One-six. That's a Friday. I try to set
13 deadlines on Fridays so junior attorneys in your respective law
14 firms hopefully won't have to work over the weekend.

15 So joint status letter on October 16. Let me know out
16 of these requests for production, requests for admission and
17 interrogatories whether you were able to resolve any of your
18 remaining differences, and if not, give me an overview of what
19 the issues are. And then also let me know where you are with
20 the rest of discovery and how you anticipate spending the next
21 couple of months. All right?

22 MR. RAMIREZ: Thank you, your Honor.

23 THE COURT: Anything else, Mr. Donovan?

24 MR. DONOVAN: Your Honor, as part of the meet and
25 confer process, I wanted to let the Court know that there is

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1 another issue, and the only reason I'm mentioning it is because
2 it's percolating now. And it deals with a non-party subpoena
3 that was served by the plaintiff on defendants' citric acid
4 supplier. We've objected to that subpoena. We had an initial
5 meet and confer and we were planning to have another one.

6 The only reason I mention it is because in the event
7 that our next meet and confer doesn't resolve it, that issue
8 may be on the radar. In the joint case management submission
9 to your Honor, ECF 71, the parties agreed that with respect to
10 depositions, that non-party depositions would follow initial
11 party depositions. The subpoena served is not a deposition
12 subpoena. It's seeking documents. But nevertheless, in that
13 spirit, and because we've already objected to some of these
14 documents and document requests, we were asking for some type
15 of agreement on sequencing that let's just proceed, given the
16 breadth and scope of the parties' disputes about discovery,
17 that we devote our attention to resolving those rather than now
18 a new skirmish about non-party discovery.

19 But hopefully during the meet and confer that we'll
20 have about the party discovery, we can address this non-party
21 subpoena. But I only advise the Court so the Court is aware of
22 that.

23 THE COURT: Thank you. So, here's what I suggest with
24 this. It's not an order, so you can feel free to use it or
25 ignore it. But in your meet and confers, for something like

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1 this, why don't you talk about what information plaintiff is
2 trying to get from your citric acid supplier, and see whether
3 that's something you're able to provide that information and
4 then you don't have to bother the non-party. So, I mean, this
5 has to be a give and take. Right. You have to work together
6 in good faith. I'm not suggesting anybody hasn't been. I'm
7 just saying that try to take it back to what is the information
8 that you're really trying to get, and is this the most
9 expedient, cost and time effective way to get it, or is there
10 maybe -- and is this the right time to be getting it. All of
11 those are at play here. Okay?

12 MR. DONOVAN: Thank you, your Honor.

13 THE COURT: All right.

14 MR. RAMIREZ: Thank you, Judge.

15 THE COURT: So raise that in your October 16 letter as
16 well if it remains an issue. If it's not, just please at least
17 let me know that it's been resolved. And then from that
18 letter, we'll see if you can move to periodic status letters or
19 whether we need to have periodic conferences. Okay?

20 MR. DONOVAN: Thank you, your Honor.

21 MR. RAMIREZ: Thank you.

22 THE COURT: My last directive here is that the parties
23 are to order the transcript from the court reporter. So stay
24 on the line with them and make sure you figure out how to do
25 that and then to share the cost. Okay.

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1 MR. DONOVAN: Thank you, your Honor.

2 MR. RAMIREZ: Thank you, your Honor.

3 THE COURT: Thank you very much. We are adjourned.

4 (Adjourned)

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